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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARK AARON VAUGHN, Defendant and Appellant.	E065589 (Super.Ct.Nos. RIF101615, SWF002036, RIF109875 & RIF75287) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Mark Aaron Vaughn appeals from the trial court's denial of three separate petitions under Penal Code section 1170.18 to reduce felony vehicle theft and receiving a stolen vehicle convictions to misdemeanors. We affirm.

PROCEDURAL BACKGROUND

On November 4, 2002, defendant entered guilty pleas in two different cases. In case No. SWF002036, defendant pled guilty to unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), with a prior vehicle theft conviction (Pen. Code, § 666.5), and admitted a prior prison term conviction (Pen. Code, § 667.5, subd. (b)). The court sentenced defendant to the middle term of three years for the conviction plus one year for the prison term enhancement, for a total term of four years.

In case No. RIF101615, defendant pled guilty to two counts of unlawfully driving or taking a vehicle with a prior vehicle theft conviction (Pen. Code, § 666.5, subd. (a)), two counts of receiving a stolen vehicle (Pen. Code, § 496d), and one count of driving without regard for the safety of others while fleeing a police officer (Veh. Code, § 2800.2). The court sentenced defendant to four years, concurrent with the sentence in case No. SWF002036.

On November 5, 2003, in case No. RIF109875, defendant pled guilty to one count of unlawfully taking or driving a vehicle with a prior vehicle theft conviction (Pen. Code, § 666.5) and one count of second degree burglary (Pen. Code, § 459). He admitted a prior prison term conviction. The court sentenced defendant to five years, concurrent with an existing sentence and with credit for time served on the existing sentence.

On January 12, 2016, defendant filed petitions for resentencing under Penal Code section 1170.18 for each of the above three cases. On January 14, 2012, the People filed their responses, each arguing the charges were not qualifying felonies under Penal Code section 1170.18. On February 24, 2016, the trial court denied each of these petitions.

This appeal followed.[1]

DISCUSSION

Defendant challenges the trial court's denial of his petitions to reduce to misdemeanors his convictions for driving or taking a motor vehicle under Vehicle Code section 10851 and receiving a stolen vehicle under Penal Code section 496d.

1. Standard of Review

When interpreting a voter initiative, "we apply the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) We first look " 'to the language of the statute, giving the words their ordinary meaning.' " (*Ibid.*) We construe the statutory language "in the context of the statute as a whole and the overall statutory scheme." (*Ibid.*) If the language is ambiguous, we look to " 'other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' " (*Ibid.*)

[1] Defendant also filed a notice of appeal in superior court case No. RIF75287. However, since no issues have been raised regarding it, we deem that appeal to be abandoned.

2. Overview of Proposition 47 and Section 1170.18

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, Penal Code section 1170.18. Penal Code section 1170.18 creates a process through which persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing. (See *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108-1109.)

Specifically, Penal Code section 1170.18, subdivision (f), provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

As relevant to the present case, Proposition 47 added Penal Code section 490.2, which provides as follows: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, . . ." (Pen. Code, § 490.2, subd. (a).)

3. Applicability of Proposition 47 to Vehicle Code Section 10851 Offenses

Penal Code section 1170.l8, subdivision (a), lists the offenses for which relief may be appropriate: "Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code." Vehicle Code section 10851 is not one of the listed offenses. Defendant nonetheless contends that because Vehicle Code section 10851 is a theft offense, and Penal Code section 1170.18 explicitly applies to theft offenses through Penal Code section 490.2 when the value of the property taken is less than $950, Penal Code section 1170.18 must also apply to violations of Vehicle Code section 10851. That issue is presently before the California Supreme Court. (*People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Gomez* (2015) 243 Cal.App.4th 319, review granted May 25, 2016, S233849; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted Mar. 16, 2016, S232344, among others.)

The crux of defendant's argument is that Vehicle Code section 10851 was indirectly amended by virtue of Penal Code section 490.2's reference to Penal Code section 487, and the circumstance that Vehicle Code section 10851 is a lesser included offense of Penal Code section 487, subdivision (d)(1). On its face, however, Penal Code section 490.2 does no more than amend the definition of grand theft, as articulated in Penal Code section 487 or any other provision of law, redefining a limited subset of offenses that would formerly have been grand theft to be petty theft. (Pen. Code, § 490.2.) Vehicle Code section 10851 does not proscribe theft of either the grand or petty variety, but rather the taking or driving of a vehicle "with or without intent to steal."

(Veh. Code, § 10851, subd. (a); see *People v. Garza* (2005) 35 Cal.4th 866, 876 [Veh. Code, § 10851, subd. (a) " 'proscribes a wide range of conduct,' " and may be violated " 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' "].) Thus, we conclude Penal Code section 490.2 does not apply to defendant's conviction offense.

4. Equal Protection and Vehicle Code Section 10851 Offenses

Defendant also contends that equal protection principles require that his conviction for unlawfully taking a vehicle in violation of Vehicle Code section 10851 be treated in the same manner as a conviction for grand theft auto in violation of Penal Code section 487, subdivision (d)(1). We disagree. Applying rational basis scrutiny, the California Supreme Court has held that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Similarly, it has long been the case that "a car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code." (*People v. Romo* (1975) 14 Cal.3d 189, 197.) The same reasoning applies to Proposition 47's provision for the possibility of sentence reduction for a limited subset of those previously convicted of grand theft (those who stole an automobile or other personal property valued $950 or less), but not those convicted of unlawfully taking or driving a vehicle in violation of Vehicle Code section

10851. Absent a showing that a particular defendant " 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' . . . the defendant cannot make out an equal protection violation." (*Wilkinson*, at p. 839.) Defendant here has made no such showing.

To be sure, "Vehicle Code section 10851 is not classified as a 'serious felony,' and it is not as serious as crimes in which violence is inflicted or threatened against a person." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 321.) It is not unreasonable to argue that the same policy reasons motivating Proposition 47's reduction in punishment for certain felony or wobbler offenses would also apply equally well to Vehicle Code section 10851. Nevertheless, if Proposition 47 were intended to apply not only to reduce the punishment for certain specified offenses, but also any lesser included offenses, we would expect some indication of that intent in the statutory language. We do not find this. The role of the courts is not to insert changes to the Penal Code or Vehicle Code beyond those contained in the plain language of Proposition 47.

5. Applicability of Proposition 47 to Penal Code Section 496d Offenses

Penal Code section 496d, subdivision (a), states in relevant part, that "[e]very person who buys or receives any motor vehicle . . . that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained . . . shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or three years or a fine of not more than ten thousand dollars ($10,000), or both, or by imprisonment in a county jail not to exceed one year or a fine of not more than one thousand dollars ($1,000), or both."

The applicability of Proposition 47 to Penal Code section 496d is currently under review before the California Supreme Court in *People v. Varner* (2016) 3 Cal.App.5th 360, review granted November 22, 2016, S237679; *People v. Nichols* (2016) 244 Cal.App.4th 681, review granted April 20, 2016, S233055; *People v. Peacock* (2015) 242 Cal.App.4th 708, review granted February 17, 2016, S230948; and *People v. Garness* (2015) 241 Cal.App.4th 1370, review granted January 27, 2016, S231031.

In *People v. Varner*, *supra*, 3 Cal.App.5th at page 366, this court recently concluded that a defendant is ineligible for Proposition 47 relief based on a conviction for violating Penal Code section 496d, "because section 496d is not included in section 1170.18," and because "there is no indication that the drafters of Proposition 47 intended to include section 496d."[2]

Since Penal Code section 1170.18, subdivisions (a) and (b), expressly include certain theft-related offenses, we presume the intent of the voters, and of the Legislature, was to exclude other theft-related offenses, such as Penal Code section 496d, which were not specifically included under Proposition 47. To construe Proposition 47 as including Penal Code section 496d would be inconsistent with our Supreme Court's instruction that we not "add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571;

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[2] Under a recent amendment to rule 8.1115 of the California Rules of Court, we may rely on the Court of Appeal's decision as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

see *People v. Guzman* (2005) 35 Cal.4th 577, 587; *People v. Varner, supra*, 3 Cal.App.5th at pp. 367-368.)

Additionally, in order to be eligible for resentencing, defendant must be a person "who would have been guilty of a misdemeanor" if Proposition 47 had been in effect at the time of the offense. (Pen. Code, § 1170.18, subd. (a).) Defendant is not such a person. Although we recognize the language, "any property," included in Penal Code section 496, subdivision (a), is broad enough to encompass a stolen vehicle, Proposition 47 left intact the language in Penal Code section 496d that makes a violation of that statute a wobbler. (Pen. Code, §§ 17, subds. (a), (b), 496d, subd. (a).) On the other hand, Penal Code section 496, subdivision (a), as amended by Proposition 47, now requires the district attorney to charge the crime as a misdemeanor if the stolen property does not exceed $950.

In the instant case, Proposition 47 does not operate to reduce defendant's sentence because the prosecutor had the discretion to prosecute defendant's Penal Code section 496d crime as either a felony or a misdemeanor, even after the passage of Proposition 47, and regardless of the value of the motor vehicle. Thus, although defendant "could have been" guilty of a misdemeanor for violating Penal Code section 496d, subdivision (a), had the People elected to prosecute the charge as a misdemeanor, defendant is not a person "who would have been guilty of a misdemeanor" had Proposition 47 been in effect at the time of the offense. (Pen. Code, § 1170.18, subd. (a).)

Language in other portions of Proposition 47 supports this conclusion. Penal Code section 490.2, subdivision (a), provides a definition of petty theft that begins with

the phrase: "Notwithstanding Section 487 or any other provision of law defining grand theft . . . ." Similarly, Penal Code section 459.5, which was also added by Proposition 47, provides a definition of shoplifting, which begins with the phrase: "Notwithstanding Section 459 [burglary] . . . ." This "notwithstanding" language is notably absent from Penal Code section 496. Because Penal Code section 496 contains no reference to section 496d, and since Proposition 47 did not amend section 496d to require sentencing as a misdemeanor, it is reasonable to assume the drafters intended section 496d to remain intact as a wobbler, with the prosecution retaining discretion to charge a section 496d offense as either a felony or a misdemeanor. The absence of any reference in Proposition 47 to Penal Code section 496d, including in the list of crimes eligible for resentencing, shows that section 496d was intended to remain beyond Proposition 47's reach. (See *Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 168; *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852; *People v. Sanchez*, (1997) 52 Cal.App.4th 997, 1001.) We therefore conclude defendant's Penal Code section 496d, subdivision (a) conviction does not qualify for redesignation under Proposition 47.

6. Equal Protection and Penal Code Section 496d Offenses

Defendant next contends that, assuming Proposition 47 applies to Penal Code section 496, subdivision (a), but not to Penal Code section 496d, subdivision (a), then the omission of Penal Code section 496d from Proposition 47 violates his constitutional rights to equal protection under the law. Consistent with our conclusion in *People v. Varner*, *supra*, 3 Cal.App.5th 360, we reject defendant's contention.

There are plausible reasons to treat sections 496 and 496d differently. For example, as the People maintain, "An owner of a vehicle relies on his or her vehicle for transportation to work, doctor's appointments, and numerous other necessities of life." Vehicle theft thus has an insidious effect on the ability of ordinary people to conduct their lives. The Legislature explicitly added section 496d to the Penal Code in order to provide "additional tools to law enforcement for utilization in combating vehicle theft and prosecuting vehicle thieves. Incarcerating vehicle thieves provides safer streets and saves Californians millions of dollars. These proposals target persons involved in the business of vehicle theft and would identify persons having prior felony convictions for the receiving of stolen vehicles for enhanced sentences." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2390 (1997-1998 Reg. Sess.) as amended June 23, 1998.)

Another plausible reason for the disparity from excluding a Penal Code section 496d conviction from qualifying for resentencing under Proposition 47 is the probable intent not to eliminate prosecutorial discretion to charge a Penal Code section 496d offense as either a felony or misdemeanor. Our Supreme Court has ruled that "numerous factors properly may enter into a prosecutor's decision to charge under one statute and not another, such as a defendant's background and the severity of the crime, and so long as there is no showing that a defendant 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' that is, ' "one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement

interests[,]" ' the defendant cannot make out an equal protection violation. [Citation.]" (*People v. Wilkinson*, *supra*, 33 Cal.4th at pp. 838-839.)

Because there are plausible reasons for distinguishing between Penal Code section 496d, subdivision (a) offenses on the one hand, and Penal Code section 496, subdivision (a) offenses on the other hand, defendant has not established any violation of equal protection in failing to extend reclassification to Penal Code section 496d, subdivision (a) offenses.

DISPOSITION

The court's orders denying the section 1170.18 petitions are affirmed. The notice of appeal in superior court case No. RIF75287 is deemed abandoned.

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CUNNISON*
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.

* Retired judge of the Riverside Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.